No. 16-1144

IN THE
Supreme Court of the United States

CARLO J. MARINELLO, II
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

REPLY BRIEF OF PETITIONER

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INTRODUCTION

The government spends much of its response brief contending that tax misconduct that occurs before an IRS proceeding is initiated should be punished. But this case is not about whether such misconduct can be punished (it can, civilly and criminally); it is about whether 26 U.S.C. § 7212(a) punishes the *distinct* crime of obstructing a pending IRS proceeding. Marinello's opening brief explained that by turning § 7212(a) into an all-purpose tax crime, the government's interpretation ignores the statute's text and history, makes a felony out of the very omissions that Congress simultaneously specified would warrant a misdemeanor, and sweeps in an enormous amount of legitimate conduct that taxpayers engage in every day.

The government's response largely does not challenge any of this. It concedes that the "due administration" language that Congress imported from a sister obstruction statute was limited to pending proceedings but tells the Court that the language should be given a far broader interpretation in the tax context. It contends that it does not matter if § 7212(a) subsumes the core crimes Congress enacted alongside it. And its response to the mammoth reach it asks this Court to give to § 7212(a) is "trust us."

None of that is correct. When Congress enacted § 7212(a) as part of the criminal tax code in 1954, it created a unified and coherent set of prohibitions and penalties. Those who fail to keep required records or file timely returns, submit false statements or documents, or attempt to evade taxes due and owing can be prosecuted regardless of whether the IRS has begun enforcement

proceedings. Section 7212(a), like the statute it was modeled on, penalizes those who obstruct IRS enforcement proceedings, conduct that is separately culpable from any pre-proceeding misconduct. The government fails to identify a single case in more than 60 years where § 7212(a) was necessary to prosecute pre-proceeding misconduct. By contrast, as Marinello and the *amici* from business, tax expert, and defense organizations have explained, the government is increasingly using its elastic interpretation of the statute to bypass the specific crimes and penalties that Congress has authorized.

The government dismisses in a footnote, Gov't Br. at 33 n.4., this Court's long line of cases serving as reminders that criminal provisions—including obstruction provisions—are not chained to maximalist interpretations, particularly when they read out neighboring provisions or sweep in conduct that Congress did not clearly intend to criminalize. As in cases like *McDonnell* and *Arthur Andersen*, this Court should follow § 7212(a)'s text, history, and structure rather than adopt the government's atextual and disruptive approach. The decision below should be reversed.

REPLY ARGUMENT

I. The Text, Structure, History, And Purpose Of § 7212(a) Confirm That It Has A Pending Proceeding Requirement

A. Section 7212(a)'s "Due Administration" Clause Concerns Obstruction Of Pending Proceedings

When Congress revised the tax obstruction statute to include obstruction of the "due administration" of the tax code, it was not drafting in a vacuum. Section § 7212(a)'s language mirrors almost word-for-word the "due administration" prohibition in 18 U.S.C. § 1503. The government seems to concede that Congress in 1954 would have understood § 1503's prohibition to be limited to pending proceedings, and it does not dispute that Congress intentionally borrowed this language for § 7212(a).[1] Gov't Br. 28-29. No other conclusion is plausible given the many ways the two statutes mimic either other in form and function. Pet'r Br. 24 (cataloging shared phrases).

As this Court has held many times, where Congress borrows statutory language with a settled meaning, Congress is presumed to intend to adopt that meaning in

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[1] The government emphasizes that § 1503's predecessor statute spelled out the connection to proceedings more clearly by using the word "therein." Gov't Br. 28. But as Marinello explained, Pet'r Br. 25 n.2, and the government concedes, Gov't Br. 28, § 1503's omission of "therein" did not change the pending proceeding requirement. Congress was entitled to use current language that carried a pending proceeding requirement (and that it had recently codified) rather than resurrect superseded language from § 1503's predecessor. Pet'r Br. 25 n.2.

the parallel statute. *E.g.*, *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, 559 U.S. 573, 589-90 (2010). None of the government's arguments for giving the same language a different meaning here is persuasive.

a. The starting point for the government's argument that Congress intended § 7212(a) to sweep more broadly than § 1503 is its question-begging premise that "justice" is administered in proceedings, while the tax code is not. Gov't Br. 27. But the administration of justice in the United States, read to its maximum breadth, could equally have been interpreted to encompass not just conduct taken in connection with pending judicial proceedings but a "wide array of activities including filing of false police reports, interfering with police investigations, or destroying evidence before a formal proceeding was underway." *United States v. Kassouf*, 144 F.3d 952, 956-57 (6th Cir. 1998).

Indeed, that was the very question this Court addressed in *Aguilar*, where the government argued that the defendant had obstructed the due administration of justice by making false statements to an FBI agent that "might or might not" affect a court proceeding. *United States v. Aguilar*, 515 U.S. 593, 600 (1995). This Court rejected that argument not because § 1503 was linguistically incapable of encompassing it, but because the Court was reluctant to presume that Congress meant to legislate so broadly as to reach every corrupt act regardless of its connection to a pending proceeding. Instead, both "deference to the prerogatives of Congress" and the need to give "fair

warning" warranted a narrower reading. *Id.* Those same considerations apply here in assessing whether Congress intended to penalize obstruction of IRS proceedings or the entire apparatus of the internal revenue system, which encompasses not just the assessment and collection of taxes, but a dizzying array of subjects including the regulation of distilled spirits plants, 26 U.S.C. § 5178, the registration of certain firearms, *id.* § 5841, and the certification of the eligibility of presidential candidates for matching funds, *id.* § 9004, among many others.

b. Moreover, the government's broader interpretation is hardly the more natural one because it treats as "obstruction" conduct that takes place long before any "due administration" does.

Congress used the verbs "obstructs" and "impedes" in connection with "administration" in § 7212(a). "Administration" means "an act of administering"; "obstruct" means to "block" or "hinder"; and "impede" means to "interfere with." *Webster's Third New Int'l Dictionary* 28, 1559, 1132 (1993). Both verbs thus imply some contact with an identifiable act of administering. It is perfectly natural to say that a taxpayer who makes false statements in connection with an audit "obstruct[s]" the "due administration" of the tax code because the taxpayer is interfering with a proceeding that is taking place with respect to him. *E.g.*, *United States v. Hall*, --- F. Supp. 3d ---, No. 16-20839, 2017 WL 3412152, at *2-4 (E.D. Mich. Aug. 9, 2017).

Conversely, it is awkward to say that a defendant "obstructs the due administration" of the tax code when any act of administering would take place, if ever,

months or years, after the purportedly obstructive conduct. For example, no one would naturally say that a taxpayer "impedes" the due administration of the code when it adopts a complex corporate structure when any assessment of that structure by the IRS would come years later. Nor would one ordinarily say, as the government does here, that it "impedes" the IRS's administration of the tax code not to provide "complete" information to an accountant who was not retained to prepare a tax return or otherwise communicate with the IRS. Similarly, a defendant who fails to pay his taxes or maintain necessary records ordinarily would be described as *violating* the tax laws, but not as "obstructing" their administration.

c. The government seeks to bridge the gap between everyday conduct and "an act of administering" by responding that the IRS acts so "regularly" and "predictably" that "every taxpayer can foresee the likely effect" that his supposedly obstructive actions will have on the administration of the tax code. Gov't Br at 10-11, 15. But the vast majority of pre-proceeding conduct—whether making a cash payment or not maintaining documents—will never be the subject of any administration by the IRS, must less affect the enforcement of the tax laws. *See, e.g.*, Dep't of Treasury, *Internal Revenue Service Data Book, 2016*, I.R.S. Publ'n 55B at 23 (2017) (approximately 0.6% of all returns audited in fiscal year 2016).[2] Indeed, that is precisely why Congress passed a series of *other* criminal statutes governing taxpayer behavior in advance of an

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[2] *Available at* https://www.irs.gov/pub/irs-soi/16databk.pdf.

enforcement proceeding—requiring taxpayers to submit detailed returns, to do so at specified times, and to keep required back-up documentation, and penalizing fraudulent submissions. *See, e.g.*, 26 U.S.C. §§ 7203, 7207.

Conversely, a taxpayer *does* have knowledge that his actions will affect the administration of the tax laws when the government has given notice of an audit, issued a summons, or initiated some other enforcement proceeding. Those who engage in obstruction once on notice of an enforcement proceeding are guilty of a crime separate and apart from any substantive tax crime they may have engaged in beforehand.

d. Nor is it any answer to say, as the government does, Gov't Br. 17, that the statute reaches individuals who "endeavor" to obstruct. That same language is present in § 1503 and it captures unsuccessful attempts at the same type of "obstruction" otherwise covered by the statute. A taxpayer will thus still violate § 7212(a) if his attempt to obstruct a proceeding fails (*e.g.*, because his attempt to silence an employee in the course of an enforcement action is unsuccessful), but actions or omissions unconnected to an IRS proceeding are not obstruction. *Cf. Aguilar*, 515 U.S. at 602 (obstruction includes a "foiled" attempt to make a "subpoenaed witness" give false testimony).

2. Finally, the government argues, Gov't Br. 30 & n.3, that if Congress had wanted § 7212(a)'s due administration clause to be limited to obstruction of IRS proceedings, then it could have borrowed language from 18 U.S.C. § 1505, which punished obstruction of "the due and proper administration of the law under which any

pending proceeding is being had before any department." But Congress was free to use § 1503's (notably more concise) language that was equally understood to refer to pending proceedings and that also tracked the other prohibitions against impeding individual officers that Congress wished to adopt. What is more notable is that the government is arguing for an interpretation of obstruction that detaches it from any pending proceeding when neither § 1503 nor § 1505 does so.

B. The Government's Interpretation Cannot Be Reconciled With The Rest Of § 7212(a)

The flaws of the government's interpretation multiply in light of the first clause of § 7212(a), which prohibits the forcible or corrupt intimidation or impediment of IRS officers.

1. The "officers" clause was the focus of Congress's attention in enacting § 7212(a), Pet'r Br. 38-39, yet the government's interpretation makes that clause wholly superfluous. As the government acknowledges, without a pending proceeding requirement, every act or omission that corruptly or forcibly intimidates or impedes an IRS officer will likewise impede the administration of the tax code. Gov't Br. 34. The government's interpretation should be rejected on that ground alone. *See, e.g.*, *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) (refusing to adopt construction that "would make § 1344's second clause a mere subset of its first"); *McDonnell v. United States*, 136 S. Ct. 2355, 2369 (2016) (refusing to adopt a reading of "matter" whereby "the terms 'cause, suit, proceeding or controversy' would serve no role in the statute").

The government responds that statutes sometimes contain redundancies and that the value of a "catchall" provision is its breadth. Gov't Br. at 34-35. But the government's interpretation does not merely catch all of the ways (beyond corruption, force, or threats of force) that a taxpayer might obstruct an IRS agent. Rather, it defines a new and vastly more expansive felony that reaches conduct, like failing to keep records, that is unconnected to any IRS agent and can occur in the privacy of one's own home. As such, § 7212(a) looks nothing like the statutes the government invokes that use a catchall provision to reach different ways of accomplishing a prohibited act.[3]

2. The government argues that because the officers clause of § 7212(a) is not limited to pending proceedings, the due administration clause should not be so limited either. Gov't Br. 31. But § 7212(a)'s officers clause is no different from § 1503's officers clause, where a pending proceeding is "irrelevant" for defendants who attack or otherwise impede judicial officers. Department of Justice, Criminal Resource Manual § 1722 (1997) (citing authority). Those cases share a clear parallel to the ones brought under the officers clause of §7212(a) because they typically involve retaliatory attacks against court officers, just as the officers' clause in § 7212(a) is used to punish individuals who retaliate against the IRS. *See*,

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[3] Nor does the government's interpretation reach wrongdoing not "specifically contemplated" by other provisions. Gov't Br. 34. The government's interpretation has § 7212(a) subsume other, far more specific, criminal provisions of the tax code. *See infra* Part II.

e.g., *United States v. Lovern*, 293 F.3d 695, 697 (4th Cir. 2002).

3. The government also argues that the *ejusdem generis* and *noscitur* canons are inapplicable, primarily because it contends that § 7212(a) does not contain a sufficiently long list of prohibited actions that would shed light on what Congress meant in the due administration clause. Gov't Br. 32. But there is no precise quantum threshold for these canons, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) (applying *ejusdem generis* to catchall provision following two other terms), and in any case § 7212(a) contains more than enough additional prohibitions to make the canons applicable. The officers clause prohibits intimidating and impeding officers, and reaches those who do so corruptly, by force, or by threat of force.

The common thread of these prohibitions is that they require interaction with the IRS. Given that commonality, the government's interpretation wrongly expands the due administration clause "to the outer limits of [Congress's] authority" by reaching such conduct as failing to provide information to an accountant or making a payment in cash. *Circuit City Stores*, 532 U.S. at 115. Conversely, the pending proceeding requirement ensures that clause covers conduct "similar in nature" to the officers clause by requiring obstruction in the context of interaction with the IRS. *McDonnell*, 136 S. Ct. at 2372.

C. Section 7212(a)'s Legislative History Supports A Pending Proceeding Requirement

The government emphasizes the modesty of the legislative history regarding the due administration, clause, Gov't Br. 36, but that modesty undermines the government's ambitions for § 7212(a). The conceded focus of § 7212(a)'s legislative history was the *officers* clause, which Congress repeatedly described as being expanded from prior law to address not just forcible obstruction but also corrupt solicitation of IRS officers. Pet'r Br. 37-38. Had Congress intended the officers clause to be superfluous, as the government affirmatively professes, then it likely would not have described the effect of the legislation as resulting in an incremental expansion of that clause. Instead, Congress's focus on the officers clause and relative silence regarding the "due administration" clause indicates that it did not understand the latter clause to wipe away the former and massively broaden § 7212(a). *Cf. Whitman v. American Trucking Associations*, 531 U.S. 457, 468 (2001) ("Congress... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

D. The Government's "Purpose" Arguments Are Unavailing

The government concludes the first part of its brief by arguing that its interpretation best serves § 7212(a)'s purpose. Gov't Br. 22-24. The reality is that the government's interpretation deprives § 7212(a) of any particular purpose. Rather than punishing the distinct harm of interfering with a pending IRS proceeding,

§ 7212(a) on the government's account serves as a handy device that subsumes more specific offenses while stripping their elements and elevating their penalties.

The government contends that without its sweeping construction of § 7212(a), it will be unable to punish wrongdoers. Gov't Br. 23. But the handful of cases it invokes establishes just the opposite: the government has ample tools to prosecute individuals who take evasive action, make false statements, or engage in other misconduct prior to an IRS enforcement proceeding. Instead, the government is increasingly using § 7212(a) aggressively to bring felony charges for conduct specified to be a misdemeanor. *See generally* N.Y. Council of Defense Lawyers *Amicus* Br. 11-13.

The *single* case the government cites as one in which it was hindered by a pending proceeding requirement is telling. Gov't Br. 24. In that case, a court dismissed a "charge that owner of tax preparation business violated § 7212(a) by directing subordinates to falsify client files in anticipation of routine IRS audits because the audits had not yet begun." *Id.* (citing *United States v. Ogbazion*, No. 15-cr-104 (S.D. Ohio Oct. 17, 2016), D.E. 66). The government neglects to mention that the defendant was also charged with—and convicted of—tax evasion, failure to collect payroll taxes, wire fraud, bank fraud, and conspiracy for that same conduct. Jury Verdict, *United States v. Ogbazion*, No. 15-cr-104 (S.D. Ohio June 6, 2017), D.E. 173.

The government invokes a few other cases where it claims it relied on its sweeping interpretation of § 7212(a), but all of them likewise establish that other statutes already covered the same conduct. *United*

States v. Crim, 451 F. App'x 196, 201 (3d Cir. 2011) (conviction for conspiracy); *United States v. Westbrooks*, 858 F.3d 317, 321 (5th Cir. 2017) (conviction for filing fraudulent tax returns); *United States v. Sorensen*, 801 F.3d 1217, 1220 (10th Cir. 2015) (defendant conceded guilt for tax evasion); *United States v. Madoch*, 108 F.3d 761 (7th Cir. 1997) (convictions for fraud); *United States v. Mitchell*, 985 F.2d 1275 (4th Cir. 1993) (conviction for aiding and assisting preparation of false tax returns).

This case—contrary to the government's assertions—is no different. The government convicted Marinello of eight misdemeanors for willful failure to file tax returns. The government elected not to charge Marinello with tax evasion but it repeatedly took the view in summation that Marinello took evasive action and failed to pay owed taxes. Trial Tr. 496, 503, 507, 516-18. To justify its request for a broad § 7212(a) in this Court, the government now contends that it was prevented from charging Marinello with tax evasion because it could not prove the "specific tax deficiency" that Marinello owed. Gov't Br. 25. But that is not an element of tax evasion. *See Criminal Tax Manual*, Government Proposed Jury Inst. No. 26.7201-14 ("The proof need not show ... the precise amount or all of the additional tax due as alleged." (citing authority)).

II. The Government's Interpretation Cannot Be Reconciled With The Code's Substantive Offenses

The government's interpretation not only fails to make sense of § 7212(a) on its own terms, it violates the basic requirement that a provision should be interpreted to be consistent with the statutory enactment as a whole

to "give coherence to what Congress has done," rather than "produce glaring incongruities." *Achilli v. United States*, 353 U.S. 373, 378-79 (1957). Marinello's opening brief explained that the government's interpretation cannot be reconciled with the tax code's other core crimes that were enacted at the same time as part of the same legislation after years of hearings and debate. Pet'r Br. 40-52. The government has no answer for the "glaring incongruities" that abound on its interpretation, and it largely asks this Court to look past them. The Court should not.

A. The Government's Interpretation Creates Glaring Incongruities

1. At the outset, the government cannot reconcile its interpretation of § 7212(a) with the two offenses that are most closely tied to it: the other offenses set out in § 7212 itself. One of those is the officers clause of § 7212(a), which as explained above, is made wholly superfluous by the government's interpretation despite having been the focus of Congress's attention. *See supra* Part I.B. The other is § 7212(b)'s prohibition against the "forcible rescue" of seized property, which requires proof that the defendant took property by force from the IRS that he knew had been seized. *United States v. Hardaway*, 731 F.2d 1138, 1144 (5th Cir. 1984).

Section § 7212(b) has a maximum sentence that is a year less than what § 7212(a) allows, yet anyone who violates it would necessarily have also violated the government's conception of § 7212(a) by impeding the IRS in order to obtain an unlawful benefit (*i.e.*, the repossession of lawfully seized property). The government opaquely suggests in a footnote, Gov't Br.

at 45 n.7, that a defendant who forcibly reclaims seized property does not necessarily intend to impede the IRS, but it is hard to see how that could be so, and the authority cited by the government does not suggest otherwise.

2a. The government also attempts to disclaim any important overlap between its account of § 7212(a) and the code's core misdemeanors set out in 26 U.S.C. § 7203, because the misdemeanors require a "willful" *mens rea*, while obstruction requires a "corrupt" *mens rea*. That is a distinction without a practical difference in the context of these tax crimes. As this Court has held, the willful *mens rea* is already a highly demanding standard that requires proof that that the defendant knowingly and voluntarily violated the law. For example, to be guilty of the misdemeanor of willfully failing to make a tax payment, § 7203, the defendant must "know" that the law obligates him to make the payment and nevertheless "voluntarily and intentionally" choose not to make it. *Cheek v. United States*, 498 U.S. 192, 201 (1991).

That leaves the government to argue that someone who intentionally did not pay taxes he knew were due might not have done so corruptly, *i.e.*, to obtain an unlawful benefit, such as retaining the money he knew he was obligated to pay over. If those defendants exist, they are rare indeed. If the government can prove that a defendant willfully violated the tax laws, it will virtually always be able to prove that defendant did so to obtain *some* unlawful benefit.[4] Indeed, in its brief in

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[4] The government also cannot explain why Congress would have wanted to make the willful failure to maintain *required* documents a misdemeanor but the failure to maintain other documents a felony,

opposition, the government seemingly agreed with this proposition when it approvingly cited the Second Circuit's observation that "the term 'corruptly endeavors' in Section 7212(a) is 'as comprehensive and accurate as if the word "willfully" was incorporated in the statute.'" BIO at 12 (quoting *United States v. Kelly*, 147 F.3d 172, 177 (2d Cir. 1998)); *see United States v. Williamson*, 746 F.3d 987, 992 (10th Cir. 2014) ("[T]he definition of *willfully* in *Cheek* and the definition of *corruptly* in the instructions in Defendant's trial have much in common."); Dep't of Justice, *Criminal Tax Manual* § 17.04 (2012) (approving Second Circuit's formulation in *Kelly*).

b. The government now conjures defendants who commit these misdemeanors out of "willful but passive neglect," "embarrassment," or some other motive, with no intent whatsoever to obtain an unlawful benefit or advantage. Gov't Br. 42. That conjecture does not account for what willfulness entails in the context of a tax crime and the cases the government cites do not support the distinction.

For example, the government invokes *Spies v. United States*, 317 U.S. 492 (1943) for the proposition that a defendant may engage in "willful but passive neglect" in intentionally failing to pay taxes he knows are due. Gov't Br. 42. From the government's recitation, it sounds as if *Spies* had identified a kind of

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or why Congress would have made willfully submitting a materially false document a misdemeanor, but also chargeable as felony obstruction. *See* Pet'r Br. 42-47 (discussing 26 U.S.C. § 7203 & § 7207).

defendant who willfully chooses not to pay his taxes but is stonily indifferent to the unlawful benefit he reaps.

Spies says nothing of the sort. In that passage, the Court was instead distinguishing the "willful but passive" defendant who intentionally does not pay his taxes from the defendant who couples that willful omission with an affirmative "willful and positive attempt" to evade his liability, such as by "keeping a double set of books." *Spies*, 317 U.S. at 499. *Spies* holds that the latter defendant is properly charged with felony tax evasion for his affirmative misconduct, while the former can only be charged with a misdemeanor failure to file because he did not undertake an affirmative act of deception. *Id.* Thus, if anything, *Spies* stands for the proposition that Congress does not make tax felonies out of omissions, which is precisely what the government's construction of § 7212(a) does.[5] The government would apparently have the Court believe that Congress intended these core willful offenses to capture defendants who did *not* act with a tax-related motive—that is, who failed to file returns, destroyed required documents, or made false statements on their returns to hide the existence of extramarital affairs and the like.

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[5] The government similarly argues that a defendant may harass an IRS agent simply to "annoy" him, and invokes an immigration case for the proposition that an immigrant may make false statements out of "embarrassment, fear, or a desire for privacy" rather than to obtain immigration benefits. Gov't Br. 42. Both observations are undoubtedly correct, but they do not suggest that the government will have any difficulty proving that an individual who willfully fails to pay taxes did so, at least in part, to obtain the benefit of not having paid his taxes.

B. Section 7212(a) Should Be Construed To Avoid Those Glaring Incongruities

The obvious and substantial overlap between felony obstruction and the code's other crimes on the government's account leaves the government to argue that such overlap is not "impermissible." Gov't Br. 43. These arguments miss the point. The question is not whether Congress *could* have chosen to make these crimes overlap with felony obstruction, but whether Congress should be understood to have intended to do so in this case. The answer to that latter question is clearly no.

1. First, the government does not even *try* to explain these incongruities. The canon against surplusage is not a mechanical rule, but this Court has repeatedly held the canon has its greatest force where a given interpretation would undercut another provision in the "same statutory scheme." *Marx v. General Revenue Corp.*, 568 U.S. 371, 386 (2013); *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011) (rejecting interpretation "which renders superfluous another portion of that same law"); *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 837 & n.11 (1988) (same) (collecting authority). "The imperative of harmony among provisions is more categorical than most other canons of construction because it is invariably true that most intelligent drafters do not contradict themselves (in the absence of duress). Hence there can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously." Antonin Scalia & Bryan A. Garner, *Reading Law* 180 (2012).

The government simply has no answer as to why Congress would have intended felony obstruction with its three-year maximum sentence to subsume these other crimes with lesser penalties. These were more specific provisions that Congress enacted at the same time, in the same comprehensive legislation designed to cohere previously disparate penalty provisions, including after express debate between the House and the Senate about whether to elevate certain misdemeanor conduct to felonies. Pet'r Br. 8-9. This Court's frequent admonition that legislation should be read "coherently" to avoid internal superfluities and incongruities is at its apex with respect to the unified criminal provisions of the 1954 code. *Achilli*, 353 U.S. at 377-79.

2. The primary tax cases cited by the government—*Spies*, *Sansone*, and *Berra*—only confirm this point. In *Spies*, for example, the government argued that a willful failure to file a tax return (a misdemeanor) could also constitute tax evasion (a felony) under the predecessor to the 1954 Code. The Court *rejected* that argument and instead held that it "would not readily assume that Congress by the felony defined in § 145(b) [tax evasion] meant no more than the same derelictions it had just defined in § 145(a) [willful failure to file] as a misdemeanor." *Spies*, 317 U.S. at 497.

The government notes that *Spies* ultimately concluded Congress distinguished the felony and misdemeanor provisions by construing the former to require an affirmative act and the latter to be complete with only an omission, a distinction that the government apparently believes to be minor. But it is a key

distinction between the Code's misdemeanors and felonies, that mere omissions—even willful ones—generally only give rise to misdemeanors. This Court's more recent cases have continued to employ this framework. *See Sansone v. United States*, 380 U.S. 343, 351–52 (1965) (explaining distinction between felony evasion and misdemeanor failure to pay); *United States v. Bishop*, 412 U.S. 346, 359 (1978) (citing distinction approvingly); American College of Tax Counsel *Amicus* Br. 32-33.

The government points to the fact that *Sansone* allowed the government to charge felony tax evasion based solely on facts that "covered precisely the same ground" as two misdemeanor provisions (failure to pay a tax under 26 U.S.C. § 7203 and filing a false document under 26 U.S.C. § 7207). But that part of *Sansone*, like *Berra v. United States*, 351 U.S. 131 (1956), simply stands for the unremarkable proposition that defendants who commit felony tax evasion will also be guilty of the misdemeanor of willfully failing to pay taxes. Nothing in these cases blesses the government's contention that this Court should assume that Congress intended that misdemeanor conduct should also give rise to a felony in the same enactment.

3. The government cites other non-tax cases as if they establish that overlapping criminal statutes are unproblematic, but those cases actually show that the Court will *not* construe criminal statutes as overlapping unless all the tools of statutory construction dictate that result. For example, in *United States v. Batchelder* the Court emphasized that nothing in the "language, structure, or legislative history" of the provisions

supported the defendant's position. 442 U.S. 114, 118 (1979). In *Loughrin*, the Court rejected the defendant's position in substantial part *because* it would have resulted in one provision of the statute in question subsuming another offense. 134 S. Ct. at 2390.

In short, the government has "no justification" for why Congress would have created overlapping statutes in this case that undermine the careful scheme of offenses that it adopted in the 1954 code.

III. The Government's Interpretation Reaches Conduct Congress Never Intended To Criminalize And Poses A Grave Danger of Prosecutorial Abuse

The government's interpretation is not just inconsistent with other criminal prohibitions in the code, it also sweeps in vast amounts of conduct that Congress never intended to criminalize, let alone make a felony. As the business, tax expert, and defense *amici* supporting Marinello have all explained, under the government's interpretation individual and business taxpayers can face a felony obstruction prosecution not just for having intentionally underpaid their taxes, but simply for having taken acts or omissions, outside the context of any tax proceeding, that make it harder for the IRS to later *assess* their tax position in the first instance.

In the context of an enforcement proceeding of which the taxpayer has notice, § 7212(a) appropriately punishes acts that impede the IRS's ability to carry out the proceeding. But outside the context of a proceeding, defining obstruction as conduct that may someday

impede the IRS's ability to assess a tax position makes the *actus reus* of obstruction essentially unlimited. For an individual, it could be the failure to keep receipts or maintain other records. And as the *amicus* brief of the Chamber of Commerce explains, Br. 4-16, businesses routinely make all sorts of decisions—including structuring, withholding, or deduction decisions, to name just a few—that have the effect of making it more difficult for the IRS to determine the corporation's tax obligations. Other examples abound, such as

- A taxpayer who instructs her bookkeeper to save every document required by IRS regulations, but not a single document more;
- A taxpayer who chooses not to share complete information with an accountant, or simply not to consult with an accountant at all; or
- A business owner who encrypts sensitive files so that outsiders cannot access them without her permission.

The government pointedly does not deny, Gov't Br. 46-47, that conduct of this kind can support a felony obstruction conviction on its view, even where there is no hint that the defendant underpaid his taxes. Instead, it contends that the statute's corrupt *mens rea* will serve to distinguish culpable taxpayers, *id.*, but with so many obstructive acts to choose among, a motivated prosecutor will easily be able to find one that he can convince a grand jury did not just have the *effect* of obstructing the IRS's assessment efforts but was *intended* to.

The government points to the safeguards provided by a jury trial, Gov't Br. 46, but as the dissenters in the Second Circuit and the defense *amici* explain, the allegation of a felony—particularly where the bad act is established and the only question is whether the defendant intended the consequences of his actions—is likely to lead to a plea in most cases anyway. Pet. App. 45a; N.Y. Council of Defense Lawyers *Amicus* Br. 24-25. That is why in cases like *Aguilar* and *Arthur Andersen*, this Court has refused to construe crimes with a "corrupt" *mens rea* to acts and omissions beyond what Congress clearly meant to cover. *Aguilar*, 515 U.S. at 600; *Arthur Andersen LLP v. United States* 544 U.S. 696, 704-05 (2005).

As Judge Hand famously said, "[a]ny one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury." *Helvering v. Gregory*, 69 F.2d 809, 810 (2d Cir. 1934). Section 7212(a) likewise does not obligate the taxpayer "to arrange his affairs" in a way that makes it maximally easy for the IRS to determine his tax position on pain of a felony if he does not. Individuals who willfully fail to pay taxes, maintain required records, or commit other substantive offenses are already subject to a battery of civil penalties and criminal punishments. In the absence of any indication from Congress that it meant to sweep so broadly and in light of the legitimate conduct that doing so would chill, this Court should hold that § 7212(a) punishes conduct that obstructs IRS proceedings and not all conduct that could turn out to impede the IRS in any way.

IV. To The Extent The Court Finds § 7212(a) Ambiguous, The Rule Of Lenity Warrants Reversal

In the event the Court finds § 7212(a) to be ambiguous, reversal is warranted under the rule of lenity. This is not merely a case where "it is *possible* to articulate an interpretation more narrow than that urged by the government," Gov't Br. at 37, but one in which there are strong grounds based on the text and structure of the provision, as well as the relevant case law, to read it more narrowly.

If Congress intended to criminalize the vast sweep of conduct the government claims and to obviate other more specific crimes, then the rule of lenity counsels that "[b]efore we choose the harsher alternative, [we] require that Congress ... have spoken in language that is clear and definite." *Cleveland v. United States*, 531 U.S. 12, 25 (2000).

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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